

THE KIRIAKOU CONUNDRUM: TO PLEA OR NOT TO PLEA



There are many symbols emblematic of the battle between the American citizenry

and the government of the United States in the war of transparency. One of those involves John Kiriakou. Say what you will about John Kiriakou's entrance into the public conscience on the issue of torture, he made a splash and did what all too few had, or have since, been willing to do. John Kiriakou is the antithesis of the preening torture monger apologist in sullen "big boy pants", Jose Rodriquez.

And, so, people like Kiriakou must be punished. Not by the national security bullies of the Bush/Cheney regime who were castigated and repudiated by an electorate who spoke. No, the hunting is, instead, by the projected agent of "change", Barack Obama. You expect there to be some difference between a man as candidate and a man governing; the shock comes when the man and message is the diametric opposite of that which he sold. And, in the sling of such politics, lies the life and fate of John Kiriakou.

Why is the story of John Kiriakou raised on this fine Saturday? Because as Charlie Savage described, Kiriakou has tread the "Path From Terrorist Hunter to Defendant". Today it is a path far removed from the constant political trolling of the Benghazi incident, and constant sturm and drang of the electoral polling horserace. It is a critical path of precedent in the history of American jurisprudence, and is

playing out with nary a recognition or discussion. A tree is falling in the forrest and the sound is not being heard.

You may have read about the negative ruling on the critical issue of “intent to harm” made in the federal prosecution of Kiriakou in the Eastern District of Virginia (EDVA) last Tuesday. As Josh Gerstein described:

Prosecutors pursuing former CIA officer John Kiriakou for allegedly leaking the identities of two other CIA officers involved in interrogating terror suspects need not prove that Kiriakou intended to harm the United States or help a foreign nation, a federal judge ruled in an opinion made public Wednesday.

The ruling from U.S. District Court Judge Leonie Brinkema is a defeat for Kiriakou’s defense, which asked the judge to insist on the stronger level of proof – which most likely would have been very difficult for the government to muster.

In 2006, another federal judge in the same Northern Virginia courthouse, T.S. Ellis, imposed the higher requirement in a criminal case against two former lobbyists for the American Israel Public Affairs Committee.

However, Brinkema said that situation was not parallel to that of Kiriakou, since he is accused of relaying information he learned as a CIA officer and the AIPAC staffers were not in the government at the time they were alleged to have received and passed on classified information.

“Kiriakou was a government employee trained in the classification system who could appreciate the significance of the information he allegedly disclosed. Accordingly, there can be no question

that Kiriakou was on clear notice of the illegality of his alleged communications.

Gerstein has summarized the hard news of the court ruling admirably, but there is a further story behind the sterile facts. By ruling the crucial issue of “intent” need not be proven by the accusing government, the court has literally removed a critical element of the charge and deemed it outside of the due process proof requirement, much less that of proof beyond a reasonable doubt.

What does that mean? In a criminal prosecution, it means everything. It IS the ballgame.

And so it is here in the case of *United States v. John Kiriakou*. I am going to go a little further than Gerstein really could in his report, because I have the luxury of speculation. As Josh mentioned:

On Tuesday, Brinkema abruptly postponed a major motions hearing in the case set for Wednesday and a hearing set for Thursday on journalists’ motions to quash subpoenas from the defense. She gave no reason for canceling the hearings.

HELL0! That little tidbit is the *everything* of the story. I flat out guarantee the import of that is the court put the brakes on the entire case as a result of an off the record joint request of the parties to facilitate immediate plea negotiation. As in they are doing it as you read this.

There is simply no other reason for the court to suspend already docketed process and procedure in a significant case, much less do so without a formal motion to extend, whether by one party or jointly. That just does not happen. Well, it does not happen unless both parties talked to the court and avowed a plea was underway and they just needed the time to negotiate the

details.

So, what does this mean for John Kiriakou? Nothing good, at best. Upon information and belief, Kiriakou was offered a plea to one count of false statements and no jail/prison time by the original specially designated lead prosecutor, Pat Fitzgerald. But the "word on the street" now is that, because the government's sheriff has changed and, apparently, because Kiriakou made an effort to defend himself, the ante has been ridiculously upped.

What I hear is the current offer is plead to IIPA and two plus years prison. This for a man who has already been broken, and whose family has been crucified (Kiriakou's wife also worked for the Agency, but has been terminated and had her security clearance revoked). Blood out of turnips is now what the "most transparent administration in history" demands.

It is a malicious and unnecessary demand. The man, his family, and existence are destroyed already. What the government really wants is definable precedent on the IIPA because, well, there is not squat for such historically, and the "most transparent administration in history" wants yet another, larger, bludgeon with which to beat the baby harp seals of whistleblowing. And so they act.

To date, there have been no reported cases interpreting the Intelligence Identities Protection Act (IIPA), but it did result in one conviction in 1985 pursuant to a *guilty plea*. In that case, Sharon Scrannage, a former CIA clerk, pleaded guilty for providing classified information regarding U.S. intelligence operations in Ghana, to a Ghanaian agent, with whom she was romantically involved. She was initially sentenced to five years in prison, but a federal judge subsequently reduced her sentence to two years. That. Is. It.

So, little wonder, "the most transparent administration in history" wants to establish a better beachhead in its fight against

transparency and truth. John Kiriakou is the whipping post. And he is caught in the whipsaw....prosecuted by a maliciously relentless government, with unlimited federal resources, and reliant on private defense counsel he likely long ago could no longer afford.

It is a heinous position Kiriakou, and his attorneys Plato Cacheris et. al, are in. There are moral, and there are exigent financial, realities. On the government's end, as embodied by the once, and now seemingly distant, Constitutional Scholar President, and his supposedly duly mindful and aware Attorney General, Eric Holder, the same moralities and fairness are also at issue. Those of us in the outside citizenry of the equation can only hope principles overcome dollars and political hubris.

Eric Holder, attorney general under President Barack Obama, has prosecuted more government officials for alleged leaks under the World War I-era Espionage Act than all his predecessors combined, including law-and-order Republicans John Mitchell, Edwin Meese and John Ashcroft.

....

"There's a problem with prosecutions that don't distinguish between bad people – people who spy for other governments, people who sell secrets for money – and people who are accused of having conversations and discussions," said Abbe Lowell, attorney for Stephen J. Kim, an intelligence analyst charged under the Act.

The once and previous criticisms of John Kiriakou, and others trying to expose a nation off its founding tracks, may be valid in an intellectual discussion on the fulcrum of classified information protection; but beyond malignant in a sanctioned governmental prosecution such as has been propounded against a civilian servant like John Kiriakou who

sought, with specificity, to address wrongs within his direct knowledge. This is precisely where, thanks to the oppressive secrecy ethos of the Obama Administration, we are today.

Far, perhaps, from the “hope and change” the country prayed and voted for in repudiating (via Barack Obama) the festering abscess of the Bush/Cheney regime, we exist here in the reality of an exacerbated continuation of that which was sought to be excised in 2008. Kiriakou, the human, lies in the whipsaw balance. Does John Kiriakou plead out? Or does he hold out?

One thing is certain, John Kiriakou is a man, with a family in the lurch. His values are not necessarily those of those of us on the outside imprinting ourselves on him.

If the government would stop the harp seal beating of Mr. Kiriakou, and at least let the man stay with his family instead of needlessly consuming expensive prison space, that would be one thing. But the senseless hammer being posited by the out for blood successor to Patrick Fitzgerald – Neil MacBride, and his deputy William N. Hammerstrom, Jr. – is scurrilous.

Rest assured, far from the hue and cry on the nets and Twitters, this IS playing out on a very personal and human scale for John Kiriakou while we eat, drink and watch baseball and football this weekend.

**THE FIRST TORTURE
COVER-UP WAS
COVERED UP BY THE**

FIRST TORTURE COVER-UP LAWYER

Document Exploitation blog has read Jose Rodriguez' book so I don't have to!

Seriously, I will eventually get around to reading Rodriguez' book, when I can get it cheaper than toilet paper. But until then, I'm glad a document wonk has done the work.

One of the more interesting observations from DocEx pertains to Judge Hellerstein's apparent misreading of CIA's promises to fix their contemptuous document responses. Click through for that. (Though now that I understand that Hellerstein was unsuccessfully trying to expose that the President had authorized all this torture, perhaps he believed he had achieved a just result.)

But the real "ah ha" for me was this—showing that the CIA lawyer that reviewed the already-damaged torture tapes and found evidence of that damage not noteworthy...

This report appears to show McPherson admitting that he saw some of the tapes were partially blank, or had snow on them.

[Redacted] for many of the tapes one 1/2 or 3/4 of the tape "there was nothing." [Redacted] on some tapes it was apparent that the VCR had been turned off and then turned back on right away. [Redacted] on other tapes the video quality was poor and on others the tape had been reused (taped over) or not recorded at all. [Redacted] The label on some tapes read "interrogation session," but when viewed there was just snow. [Redaction] did not make note of this in [redaction] report.

[Redaction] estimated that “half a dozen” videotapes had been taped over or were “snowy.”

Though he claims not to have noticed that two of the tapes were broken (though perhaps they were broken later). When asked why he had not reported the blank tapes in his report, McPherson said he didn’t find that “noteworthy.”

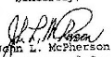
... Was also the lawyer who provided the original, contemptuous FOIA response.

Rodriguez’s account also sheds new light on a crucial lynchpin in the **ACLU FOIA** case by identifying the CIA attorney from the Office of General Counsel (OGC) who viewed the videotapes in Nov. 2002 as “one of the assistant general counsels” whom Rodriguez calls “a very senior Agency officer.” The attorney was later interviewed by the CIA Office of Inspector General (OIG) about that review. Rodriguez’s small, but important details corroborate earlier reporting by the **AP** and **WashPo** that the OGC attorney was John L. McPherson, who based on unrelated court filings, was an Assistant General Counsel as of 2001 and later became an Associate General Counsel.

Why is this significant? Hellerstein found the tapes subject to FOIA because they were “identified and produced to” the CIA’s OIG “as part of its investigation into allegations” of unauthorized interrogations and human rights violations. Yet Hellerstein stopped short of finding the CIA in contempt in part because “the individuals responsible for processing and responding to plaintiffs’ FOIA requests may not have been aware of the videotapes’ existence before they were

destroyed.”

Remarkably, however, the crucial FOIA response from the CIA regarding the records of the OIG in April 2005 (ergo, 7 months prior to the destruction of the tapes) was written by none other than John L. McPherson. That is, the most important FOIA response in the case was written by the very CIA attorney who, if reporting that Rodriguez’s book tends to support is true, arguably knew more about the tapes than anyone else. See for yourself [here](#).

Sincerely,

John L. McPherson
Associate General Counsel

In other words, the lawyer who chose not to mention the torture tapes in the original ACLU FOIA is the guy who first saw evidence the torturers were exceeding DOJ guidelines and covering that up on those torture tapes.

That’s the guy, by the way, John Durham gave immunity to.

WHAT IF THE BIGGEST RISK ISN’T KHALID SHEIKH MOHAMMED GIVING SPEECHES?

The guy who covered up CIA’s torture, Jose Rodriguez, worries that Khalid Sheikh Mohammed might give a speech during the course of his military commission.

Although he acted defiantly in court, Rodriguez said KSM would like nothing more than a forum to preach radical Islam.

"This is a process that will continue for a long time," Rodriguez said. "I have heard he may plead not guilty, and if he does, he'll use the [legal] process as his platform . . . to talk about his jihadist beliefs."

[snip]

"It seemed to us that he was looking for a platform from which he could spout his hatred for all things American, and a trial would certainly present that opportunity," Rodriguez writes. "It strikes me as more than a little ironic that several years later, Attorney General Eric Holder almost granted KSM his wish."

Ironically, Rupert's rag decided to plug these Rodriguez fears the day after KSM and his co-defendants tied up the military commission in knots not by speaking, but by remaining silent.

Judge [James] Pohl turns to Mohammed's attorneys and his right to counsel. Mr. Mohammed, he says, pursuant to the Manual for Military Commissions, you are today represented by two military lawyers, Derek Poteet and Jason Wright, your detailed counsel. Do you understand this?

There's a pause – the first of many, as we'll soon see – as the court and counsel wait for the defendant's responds. KSM doesn't give one, and Judge Pohl notes as much. Very well, he continues, detailed counsel will be provided to you.

No response.

Pohl adds that Mohammed also has the option to request different military counsel; Mohammed has the right to ask the Office of the Chief Defense Counsel to provide any lawyer from its staff, to

the extent they are available.

Cricketts again from Mohammed.

If, Judge Pohl goes on, your request for different military attorneys is approved, then Poteet and Wright no longer will be available to represent you. Do you understand this?

Silence.

Pohl next asks if Mohammed wants a different military lawyer than that detailed.

No answer.

The sole comment from the defendants, apparently, came from Ramzi bin al-Shibh.

In this court appearance, the only verbal outburst came from Bin al Shibh, who blurted at one point that the prison camp leadership was just like Moammar Gadhafi, the slain Libyan dictator.

When the judge tried to hush Bin al Shibh, explaining the accused would be given a chance to speak later, the Yemeni replied: "Maybe they are going to kill us and say that we are committing suicide."

Bin al-Shibh's comments may reflect a remarkable access to and analysis of damning news coverage. But they don't amount to the kind of propagandistic diatribe that was one reason cowards like Chuck Schumer fought having this trial in a civilian court in Manhattan.

I have no idea how the silent treatment on the part of the defendants will affect the legitimacy of the 9/11 military commission. I would think victims' families might grow impatient with our justice system, with potentially troublesome consequences, while the many international observers might view the

whole thing as a bigger clusterfuck than the Slobodan Milošević trial. Repeated efforts to censor the defendants' lawyers from mentioning the torture we know Jose Rodriguez' torturers inflicted may focus more attention on that torture.

There was a time when pundits were talking about what a great display of American institutions and rule of law a trial would be for KSM and the other 9/11 plotters. That may still happen. Or, it may be that the silent treatment will serve to focus attention on America's shame and fear instead of our well-established and laudable civilian judicial system—what was once our pride.

Compare all that to the UndieBomber, who may have none of KSM's evil guile, but even still had his 15 minutes of fame—the soapbox for radical jihad that Jose Rodriguez cowers in fear of—pass almost unnoticed.

The government could have meted justice to KSM by now, had it shown minimal courage of conviction and belief in our institutions. Instead, the world may well see America's embarrassing embrace of ad hoc justice instead of the institutions that once made us great. And that may be far more damning than anything KSM might have to say.

BIG BOY PANTS AND THE PRESIDENCY

Frankly, I think Jose Rodriguez was being naive when he claimed that having Jay Bybee's signature on a memo authorizing some, but not all, of the torture the torturers had already done by August 1, 2002 constituted full authority for what they had done.

I But before moving forward, Jose

Rodriguez got his superiors, right up to the president – to sign off on a set of those techniques, including waterboarding.

Jose Rodriguez: We needed to get everybody in government to put their big boy pants on and provide the authorities that we needed.

Lesley Stahl: Their big boy pants on–

Jose Rodriguez: Big boy pants. Let me tell you, I had had a lot of experience in the agency where we had been left to hold the bag. And I was not about to let that happen for the people that work for me.

Lesley Stahl: There wasn't gonna be any deniability on this one?

Jose Rodriguez: There was not gonna be any deniability. And I tell you something. In August of 2002, I felt I had all the authorities that I needed, all the approvals that I needed. The atmosphere in the country was different. Everybody wanted us to save American lives.

After all, to this day, these counterterrorism programs are being run on a Memorandum of Notification that not only doesn't comply with the terms of the National Security Act, but shields the President (Obama even more so than Bush) from any direct accountability, a carefully crafted deniability that the CIA has worked to preserve.

Lesley Stahl was apparently not up to the task of asking Rodriguez about the torture the torturers actually used which exceeded the terms of the authorization. She describes waterboarding as laid out in the Bybee Memo, without acknowledging that the torturers didn't follow those guidelines. Stahl asserts as fact that the CIA kept Abu Zubaydah up for 3 straight

days, when evidence suggests his sleep deprivation lasted longer, perhaps as long as 11 days. Had Stahl laid out the degree to which the torturers were known to have exceeded guidelines (both before and after those guidelines were codified in the Bybee Memo), she might have noted the underlying problem with this exchange.

Lesley Stahl: Oh, you had rules for each thing?

Jose Rodriguez: Yes, we had rules. And not only that, but every time we did any of this, we had to ask permission. The field had to ask permission of headquarters.

Lesley Stahl: Each time.

Jose Rodriguez: Each time.

As she herself pointed out, Rodriguez was not doing the torture. He wasn't in the field. He was at HQ. In fact, he was one of the guys sitting in Langley giving the oral permissions for individual torture techniques both before and after Bybee signed his memo, the techniques that exceeded the rules laid out in Bybee. You'd think Stahl might have pointed that out.

There's something similar going on in this passage.

Lesley Stahl: Mock executions. People threatened with power drills.

Jose Rodriguez: Yes.

Lesley Stahl: People told that, that you were gonna go and hurt their children, rape their wives.

Jose Rodriguez: Stupid things that were done by people who had no authority to do that.

Lesley Stahl: And they just took it on themselves.

Jose Rodriguez: Correct. And we found

out about it and we self-reported, and actually called in the I.G. and said, “You better take a look at what these people did and do what you need to do.”

A big reason the CIA sought OLC sanction after the fact is that the torturers brought out a coffin-shaped box and prepared to use it with Abu Zubaydah. In response, Ali Soufan left the black site, citing the CIA’s use of borderline torture. When CIA attempted to get everything they had done and planned to do authorized by DOJ, they included mock burial among the techniques in question. As I’ve noted, the failure to get OLC buyoff for mock burial—regardless of what they called the small box confinement they used with Abu Zubaydah—made all the later mock executions legally suspect in a way even waterboarding beyond the scope of Bybee’s approval did.

Though no one seems to have gotten in trouble not just for rape threats of prisoners’ family members, of prisoners themselves, or even imprisonment of prisoners’ children, so I’m not sure why Rodriguez is claiming to be squeamish about that too.

And since Stahl was not in the business of journalism with this interview, it’s unsurprising all she missed in this exchange on the actual torture tapes.

Lesley Stahl: Well, that’s ironic. You wanted to have a video record that he was being well treated, but in the end they became— a video record that he had been subjected to these harsh techniques.

Jose Rodriguez: Yeah, we weren’t hiding anything.

Lesley Stahl: But you then ordered these tapes destroyed.

Jose Rodriguez: Correct. Ninety-two tapes.

Lesley Stahl: Ninety-two tapes. Why did you order that they be destroyed?

Jose Rodriguez: To protect the people who worked for me and who were at those black sites and whose faces were shown on the tape.

Lesley Stahl: Protect them from what?

Jose Rodriguez: Protect them from al Qaeda ever getting their hands on these tapes and using them to go after them and their families.

[snip]

Jose Rodriguez: Everything that was on those tapes were authorized activities by the U.S. government. So there was nothing to cover up.

Not that Stahl was going to note that much of the tapes Rodriguez had destroyed—perhaps as many as half—were blank, tampered, and mangled. By no means were all these 92 tapes depicting the torture, and we have every reason to assume the tapes did not depict the worst torture (they may have depicted only 3/5 of the waterboarding sessions at all).

Furthermore, the guards, at least (though not Abu Zubaydah's torturers) wore masks.

But I'm particularly interested in Rodriguez' last claim: "everything that was on the tapes were authorized activities by the US government."

Yes, and many of the tapes that taped interrogation sessions were blank by the time Rodriguez destroyed them.

Those are not incompatible claims in the least. Indeed, Rodriguez' claimed certainty that what was on the tapes when he destroyed them had been authorized may well stem from an awareness that the stuff that had already been destroyed was not authorized.

Over and over again, Rodriguez dodges the degree to which the CIA program exceeded even the oral authorizations given for torture and the evidence that Rodriguez—right at the nexus of accountability for the times CIA exceeded what guidelines they had been given—was protecting himself when he destroyed these tapes.

Which brings us to this wail.

Lesley Stahl: President Obama has said that what we did was torture.

Jose Rodriguez: Well, President Obama is entitled to his opinion. When President Obama condemns the covert action activities of a previous government, he is breaking the covenant that exists between intelligence officers who are at the pointy end of the spear, hanging way out there, and the government that authorized them and directed them to go there.

Let's review what's going on here.

Rodriguez—whose torturers broke the law with no written cover from the President, went to “everybody in government” and demanded they don their “big boy pants.” He claims they did, to his satisfaction. But somehow, all the ways his torturers either didn't have authorization or Rodriguez had insufficiently submitted Bush and Cheney to big boy pants has left them exposed for crimes (though not really, because Rodriguez knows Obama isn't going to prosecute).

And so now that Rodriguez' big boy pants have failed, he invokes, instead, a “covenant,” which says Presidents have to pretend their predecessors wore precisely the big boy pants CIA's torturers hoped they had, after the fact.

Don't get me wrong—to some degree Rodriguez is fucked because while he was boasting of his big boy pants the rest of the national security establishment was building in protections for the guy Rodriguez insinuates was forced to wear them.

Jose Rodriguez looks awfully tough boasting of having made our Cowboy President wear big boy pants, of invoking a “covenant” that binds all future Presidents to overlook our spooks’ past crimes. And maybe Presidents are as responsive to Rodriguez’ taunts as he makes out.

Still, if I were President reading a torturer try to insulate himself for his past crimes, I might not take too kindly to this taunt about big boy pants.

WHY JOSE RODRIQUEZ SHOULD BE IN PRISON, NOT ON A BOOK TOUR

As Marcy noted, Adam Goldman and Matt Apuzzo of the AP have gotten their hands on an early copy of Jose Rodriguez’s new screed-book, “Hard Measures”. The one substantive point of interest in their report involves the



destruction of the infamous “torture tapes”. What they relate Rodriguez saying in his book is not earth shattering nor particularly new in light of all the reporting of the subject over the years, but it is still pretty pretty arrogant and ugly to the rule of law:

The tapes, filmed in a secret CIA prison in Thailand, showed the waterboarding of terrorists Abu Zubaydah and Abd al-

Nashiri.

Especially after the Abu Ghraib prison abuse scandal, Rodriguez writes, if the CIA's videos were to leak out, officers worldwide would be in danger.

"I wasn't going to sit around another three years waiting for people to get up the courage," to do what CIA lawyers said he had the authority to do himself, Rodriguez writes. He describes sending the order in November 2005 as "just getting rid of some ugly visuals."

As you may recall, specially assigned DOJ prosecutor John Durham let the statute of limitations run out on prosecuting Jose Rodriguez, and others directly involved, including four Bush/Cheney White House attorneys (David Addington, Alberto Gonzales, John Bellinger and Harriet Miers) involved in the torture tapes destruction, as well as two CIA junior attorneys, on or about November 9, 2010. There was really never any doubt about what Rodriguez's motivation was in light of the fact he destroyed the tapes of Abu Zubaydah and al-Nashiri within a week of Dana Priest's blockbuster article in the Washington Post on the US "black site" secret prisons.

But, just as there was no doubt, then or now, as to the motivation of Rodriguez and/or the others, there was similarly never any doubt about the legitimate basis for criminal prosecution. The basic government excuse was they could not find any proceeding in which the torture tapes were material to so as to be required to have been preserved. For one thing, Judge Alvin Hellerstein determined the tapes were indeed material to the ACLU FOIA suit and within the purview of their evidentiary hold (even though he refused to hold CIA officials in contempt under the dubious theory they may not have had notice).

More important, however, was the immutable and

unmistakable fact that the torture tapes were of specific individuals, al-Qaeda members Abu Zubaydah and Abd al-Rahim al-Nashiri, who, at the time of destruction of the tapes, were in detention awaiting trial, whether it be in an Article III court or a military commission. With al-Nashiri there was the added fact that he was a named co-conspirator (though unindicted) in the open indictment of his Cole bombing mates al-Badawi and al-Quso. It was, and is, patently duplicitous to claim there were no possible cases the tapes had pertinent evidentiary value to. And the DOJ knew it. Because I told them in a letter prior to the expiration of the statute of limitations:

Secondly, I would like to point out that should you be thinking about relying on some rhetoric that Mr. Durham simply cannot find any crimes to prosecute and/or that there were no proceedings obstructed, it is intellectually and legally impossible to not consider the tapes to be evidence, and as they almost certainly exhibit torture to some degree and to some part they would almost certainly be exculpatory evidence, in the cases of Abu Zubaydah and al-Nashiri themselves. The United States government continues to detain these individuals and they have charges that will putatively be brought against them in some forum (civil or tribunal), Habeas rights and/or indefinite detention review processes that will occur in the future.

In short, there exist not just the potential, but the necessity, of future proceedings, and agents of, or on behalf of, the United States government have destroyed material, and almost certainly exculpatory, evidence. Crimes have been committed. At a bare root minimum, it is crystal clear Jose Rodriquez has clear criminal liability; there are, without question, others culpable too.

In short, the tapes were material evidence in multiple ways, in multiple forums, and the crime of obstruction of justice by destruction of evidence is patently obvious. If you have any questions about the willingness of the DOJ to charge obstruction of justice for evidence destruction, look no further than yesterday's charging affidavit for destruction of text messages in the BP Gulf Oil Spill case. The DOJ knows how to charge the kind of crimes Jose Rodriquez and the others committed when they want to. Thing is, the DOJ of Barack Obama and Eric Holder did NOT want to charge any crime, even patently obvious obstruction, that impinged on the Bush/Cheney illegal torture program.

Marcy made a very salient point in that "the problem with the torture tapes is not what they showed, but what they didn't show". That may well be true, but it does not detract from the fact the tapes were directly material evidence to Abu Zubaydah and al-Nashiri, in fact it only confirms the malicious intent the government had with respect to covering up their torture – the blank spots and erasures are powerful evidence. In and of themselves, the blank spots, erasures and inoperability of some of the tapes, in conjunction with the corresponding torture session logs, demonstrate malicious intent to cover up torture.³ And let's not mince words, whatever was still on the tapes was so powerful that it shocked the conscience of CIA Inspector General John Helgerson and displayed, at a minimum, waterboarding. So, there was critical evidence of many varieties possessed in and on the tapes Jose Rodriquez et. al wantonly destroyed.

So, why is Jose Rodriquez out running free, pimping his book and slamming President Obama, instead of in a federal prison? Well, it most certainly is not because he could not have been charged and convicted, it is because the Administration of Barack Obama refused to do so. Jose Rodriquez is one wired in spooky guy, and the CIA, well there is no telling what they might do to protect themselves. Maybe Dianne

Feinstein and the Senate Intel Committee could investigate what levers Rodriquez and the Company pushed to obtain this result before the reach they looming completion of their “investigation” of the Bush/Cheney interrogation program.

[UPDATE] And Dana Priest has just weighed in this morning with her take on Rodriquez and his book. The entire article at the Washington Post is worth a read, but the pertinent part for this post is:

In late April 2004, another event forced his hand, he writes. Photos of the abuse of prisoners by Army soldiers at the Abu Ghraib prison in Iraq ignited the Arab world and risked being confused with the CIA’s program, which was run very differently.

“We knew that if the photos of CIA officers conducting authorized EIT [enhanced interrogation techniques] ever got out, the difference between a legal, authorized, necessary, and safe program and the mindless actions of some MPs [military police] would be buried by the impact of the images.

“The propaganda damage to the image of America would be immense. But the main concern then, and always, was for the safety of my officers.”

Readers may disagree with much of what Rodriguez writes and with the importance of some of the facts he omits from his book, but the above sentence speaks volumes about why this book is important. In this case, a loyal civil servant – and the decision-makers above him who blessed these programs – were not thinking about the larger, longer-lasting damage to the core values of the United States that disclosure of these secrets might cause. They were thinking about the near term. About efficiency.

About the safety of friends and colleagues. In their minds, they were thinking, too, about the safety of the country.

And after some back-and-forth with agency lawyers for what seemed to him the umpteenth time, he writes, Rodriguez scrutinized a cable to the field drafted by his chief of staff, ordering that the tapes be shredded in an industrial-strength machine. The tapes had already been reviewed, and copious written notes on their content had been taken.

"I was not depriving anyone of information about what was done or what was said," he writes. "I was just getting rid of some ugly visuals that could put the lives of my people at risk.

"I took a deep breath of weary satisfaction and hit Send."

Priest is exactly right about "the larger, longer-lasting damage to the core values of the United States". One of those values is fairness and the rule of law. Those values demand that the rights of the accused rate just as much or more moment than the self serving cover you rear desires of the accusers and abusers.

(Graphic by the one and only Darkblack)

JOSE RODRIGUEZ' IDEA OF "UGLY VISUALS": BLANK AND ALTERED

TAPES

Jose Rodriguez, not exactly a squeamish guy, is spreading a myth that the reason he destroyed the torture tapes was because the torture depicted on them was so bad that people would kill CIA officers in response to the violence

Especially after the Abu Ghraib prison abuse scandal, Rodriguez writes, if the CIA's videos were to leak out, officers worldwide would be in danger.

"I wasn't going to sit around another three years waiting for people to get up the courage," to do what CIA lawyers said he had the authority to do himself, Rodriguez writes. He describes sending the order in November 2005 as "just getting rid of some ugly visuals."

Except there's a problem with that claim.

The problem with the torture tapes is not what they showed, but what they didn't show. Such as the two separate waterboarding sessions that were, for some reason, not captured on tape at all.

OIG found 11 interrogation tapes to be blank. Two others were blank except for one or two minutes of recording. Two others were broken and could not be reviewed. OIG compared the videotapes to logs and cables and identified a 21-hour period of time" which included two waterboard sessions" that was not captured on the videotapes.

Or the way many of the tapes showed some sign of tampering that hid their content.

[Redacted] for many of the tapes one 1/2 or 3/4 of the tape "there was nothing." [Redacted] on some tapes it was apparent that the VCR had been turned off and then turned back on right away.

[Redacted] on other tapes the video quality was poor and on others the tape had been reused (taped over) or not recorded at all. [Redacted] The label on some tapes read “interrogation session,” but when viewed there was just snow. [Redaction] did not make note of this in [redaction] report. [Redaction] estimated that “half a dozen” videotapes had been taped over or were “snowy.”

In other words, the tapes probably didn’t show the worst torture sessions. On the contrary, the tapes were enduring proof that the torturers tampered with the tapes to make sure they didn’t show the torture sessions.

Apparently, Jose Rodriguez thinks a bunch of snowy taped over tapes—proof that the torturers covered up evidence of what they did—constitutes “ugly visuals.” And I guess it does, but not in the way he’s claiming in his book.

RIZZO’S BRIEF WITH NANCY PELOSI: BUSH DIDN’T INCLUDE TORTURE IN THE FINDING AUTHORIZING TORTURE

I’m going to deal with John Rizzo’s purported “mea culpa” in three posts, one each for each of his regrets.

Rizzo’s first regret is that the CIA did not push the White House to allow it to brief the entire intelligence committees so they could, as Rizzo said, “allow the committees—compel them,

really—to take a stand on the merits to either endorse the program or stop it in its tracks.”

It’s an argument I totally agree with. But to make his argument, Rizzo mobilizes some of the same lies about the CIA’s briefing of the torture program, notably about Nancy Pelosi. He does so, however, with a really spooky move.

Shortly thereafter, almost seven years after CIA first informed her about its employment of waterboarding and the other EITs, the Speaker of the House of Representatives, Nancy Pelosi, stood before the cameras and claimed that all CIA ever told her was that waterboarding was being “considered” as an interrogation tactic, not that it would be ever employed. Confronted with evidence to the contrary, the Speaker subsequently conceded that she had been informed about EITs from the outset but insisted she was always opposed to them but powerless to do anything to stop them. None of which was true, but in hindsight the Speaker’s moonwalk was hardly unforeseeable.

It’s the same old story turning the question of whether Pelosi was briefed prospectively or historically into a claim that “she had been informed about EITs from the outset” without mentioning that even Porter Goss’ version of the briefing is consistent with Pelosi’s claim that CIA didn’t tell them in September 2002 that they had already started using torture. Rizzo’s use of this tired tactic is all the worse considering that 1) it appears that he was not at the briefing in question, and 2) the CIA changed its record of the briefing after the fact.

In other words, Rizzo’s attack on Pelosi is total bullshit. Furthermore, the attack falsely suggests that CIA briefed Congress before torture started.

But his use of Pelosi to make this point is rather intriguing. Rizzo makes no mention of Bob Graham’s attempt to exercise oversight over the

torture program, which was discouraged by the CIA and thwarted by Pat Roberts.

More significantly, Rizzo makes no mention of Jane Harman, who **did** object to the program but proved unable to “stop it in its tracks.”

Rizzo’s silence about CIA’s briefing to Harman—and her objection to the torture program—is more significant given something else he asserts in this piece.

A few days after the attacks, President Bush signed a top-secret directive to CIA authorizing an unprecedented array of covert actions against Al Qaeda and its leadership. Like almost every such authorization issued by presidents over the previous quarter-century, this one was provided to the intelligence committees of the House and Senate as well as the defense subcommittees of the House and Senate appropriations committees. However, the White House directed that details about the most ambitious, sensitive and potentially explosive new program authorized by the President—the capture, incommunicado detention and aggressive interrogation of senior Al Qaeda operatives—could only be shared with the leaders of the House and Senate, plus the chair and ranking member of the two intelligence committees.

Rizzo starts by invoking the September 17, 2001 Presidential Finding that authorized the CIA to capture and detain al Qaeda members. He tells us—this may be news, actually—that that Finding was briefed to the entire intelligence committees and to appropriations committees. But then he says that the torture part of that program “could only be shared” with the Gang of Eight.

The detail is interesting, by itself, for the way it contradicts Rizzo’s later (false) claim that “every other member of Congress” “would be kept in the dark” about the torture program. After all, the Leaders are also members of

Congress, but if the CIA's own error-ridden briefing list is to be believed, the only Leader who ever got briefed in that role was Bill Frist (while Appropriations Subcommittee Republicans Duncan Hunter, Ted Stevens, and Thad Cochran also got briefings, as well as John McCain).

The comment is more interesting for what it says about the Finding itself. The CIA has long suggested (and reporting has repeated) that that Finding authorized the torture program. But Rizzo is making it clear here that that Finding did not include authorization for the torture program. The oral briefings the Gang of Four got were the only way the way the President informed Congress about the torture program.

While it's significant that Rizzo is here admitting that fact, we already knew it. We knew it because Jane Harman twice asked about a Finding on torture, once implicitly in 2003 when she asked "Have enhanced techniques been authorized and approved by the President?" and once in the briefing CIA gave her on July 13, 2004, when she, "noted that the [redacted—almost certainly the Finding] did not specify interrogations and only authorized capture and detention."

In other words, Rizzo basically admits that the point Jane Harman appears to have made repeatedly was correct: the torture program had not been formally included in a Finding briefed to Congress.

Rizzo's lies about briefing Congress don't appear to be the issue here. Rather, the problem is that the Administration did not issue the legally required Finding to Congress.

DURHAM TORTURE TAPE

CASE DIES, US DUPLICITY IN GENEVA & THE PRESS SNOOZES

Just how inattentive and asleep at the wheel does the government think the American media and citizenry are, to brazenly engage in the simultaneous duplicity of relying on the Durham investigation in Geneva for the UN UPR On Human Rights at the same moment it was using the Durham investigation to bleed out the statute of limitation on the primary jurisdiction of the investigation at home? Well, they think the media and people are completely asleep and, sadly, they are quite correct.

CHENEY PISSED AT BUSH: DISTRACTION WITH THE WRONG COVER-UP

Today's news will be dominated with Bush's admission that Cheney was mad at him for not pardoning Libby.

Bush, in an interview aired Monday on TODAY, said Cheney was angry that Bush only commuted the sentence of I. Lewis "Scooter" Libby, convicted of lying during the leak investigation.

[snip]

'I can't believe you're going to leave a soldier on the battlefield,' former president says ex-VP told him.

Of course we already knew this. This was widely

reported just after Obama's inauguration. And as I pointed out at the time, the underlying story to the non-pardon probably has everything to do with making sure that Libby won't ever reveal Bush's own role in exposing Valerie Plame's identity.

It would have been nice if Matt Lauer asked Bush about whether he refused to pardon Libby so as to keep him silent, but I suppose Lauer's job is to help Bush sell books, not to ask tough questions.

But an even better question would have been to ask Bush whether he believes, with the statute of limitations expiring on the torture tape destruction, his own role in approving torture is now safe. Bush allies have spun a nice story that the White House opposed the destruction of the torture tapes and was mad that Jose Rodriguez did it anyway. If that's true (ha!), then Bush ought to be pissed that Rodriguez is, apparently, getting away with it. But again, I think Lauer's role is to help Bush sell books, not ask the difficult questions.

As the press is distracted with a rehashing of the successful cover-up of one of Bush's crimes, we ought to remember that today marks the successful cover-up of a more horrible crime.

LETTER TO DOJ AND JOHN DURHAM RE: TORTURE TAPE CRIMES EXPIRING

As we have heard absolutely nothing from Eric Holder, John Durham, the DOJ or the Obama Administration in relation to indictments or other results of the investigation Mr. John Durham has been conducting since January 8,

2008, nearly three years, I thought a letter was in order asking just exactly what their status was. Here is that letter.